

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

RUBEN CUADRA,

Defendant and Appellant.

A152760

(San Mateo County
Super. Ct. No. SC083470A)

Ruben Cuadra appeals from a judgment of conviction and sentence imposed after he entered a plea of no contest to multiple counts. He contends the court's denial of his motion to withdraw his no contest plea should be reversed because (1) the court should have allowed expert witness testimony to show his plea was not knowing and voluntary; and (2) his attorney provided ineffective assistance by failing to ask for a continuance of the trial so Cuadra could further consider the plea offer. We will affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

An amended information charged Cuadra with 22 counts of sex crimes perpetrated upon his step-daughter, Jane Doe, including kidnapping in the commission of a sex offense (Pen. Code, § 209, subd. (b)(1)); five counts of forcible rape (§ 261, subd. (a)(2)); five counts of aggravated sexual assault of a child based on rape (§ 269, subd. (a)(1)); two counts of aggravated sexual assault of a child based on sexual penetration (§ 269, subd. (a)(5)); four counts of lewd and lascivious acts upon a child under the age of 14

years (§ 288, subd. (a)); and five counts of forcible lewd and lascivious acts upon a child under the age of 14 years (§ 288, subd. (b)(1)).¹

According to evidence at the preliminary hearing, Jane informed law enforcement in March 2015 that Cuadra had molested and raped her numerous times between March 1999 and April 2010. After a two-hour interview in which she provided extensive details to Detective Jesse Myers of the San Mateo County Sheriff's Work Program, Myers arranged for Jane to make a pretext call to Cuadra to elicit incriminating statements. During the call, Jane confronted Cuadra about sexual assaults and rapes; Cuadra did not deny sexually assaulting Jane and apologized for his actions.² In addition, Jane's Aunt Irma told Detective Myers that she once went into Jane's bedroom and saw Cuadra in bed with Jane, who was pulling up her underwear; Jane denied anything happened but began to cry. Jane's brother Freddie told Detective Myers that, on about "20 occasions," Cuadra gave him chores to do outside the house and locked the front door to be alone with Jane. On one of those occasions, Freddie heard Jane scream, " 'No, no, no, no more.' " Freddie did not tell anyone, however, because Jane said that Cuadra threatened to kill or harm their family. Jane did not report the assaults to her mother due to her mother's history of mental health issues.

A. No Contest Plea

On April 4, 2016, the date set for trial, Cuadra entered a plea of no contest to counts 3, 7, 10, and 13 – four counts of forcible lewd and lascivious conduct on a child under the age of 14 years (§ 288, subd. (b)(1)) – in exchange for a stipulated sentence of 32 years in state prison and the dismissal of the remaining 18 counts. The plea arrangement was recorded on a change of plea form Cuadra signed while represented by counsel and assisted by a Spanish-language interpreter. In open court, Cuadra acknowledged that the plea form, written in English, had been read to him the week prior by a Spanish interpreter and recent changes to the form had been explained to him by the

¹ Unless otherwise indicated, all statutory references are to the Penal Code.

² In his later motion to withdraw his plea, however, Cuadra argued that the transcript of the call showed he repeatedly denied Jane's accusations.

interpreter in court. Cuadra acknowledged that he had spoken with his attorney about the charges and possible defenses, understood his trial rights, and waived them. The court found Cuadra's waiver to be "free, knowing, and intelligent." The court then accepted Cuadra's pleas, which Cuadra entered without an admission of guilt. (See *People v. West* (1970) 3 Cal.3d 595.)

B. Motion to Withdraw Plea

Before sentencing, Cuadra obtained new counsel and, on April 20, 2017, filed a motion to withdraw his plea. He argued that his plea was not knowing and voluntary because he lacked sufficient time to comprehend certain information revealed to him on the day he pled. The motion noted that Cuadra lacked experience with the criminal justice system, had minimal education, was very unsophisticated, and was functionally illiterate. A hearing on the motion took place on September 21, 2017.

1. Attorney Chase's Testimony

When he entered his plea, Cuadra was represented by Steven Chase, an attorney whose practice spanned 46 years. Chase testified that the prosecutor had been treating the matter as a "life case," with no plea offer forthcoming. Cuadra urged Chase to get him a "deal," because his fellow jail inmates who went to trial were convicted and faced "many, many years" in prison. Chase approached the prosecutor with a proposal for a 20-year sentence, but the prosecutor advised that the sentence would have to be "at least 30."

Chase again consulted with Cuadra, and on March 29, 2016, Cuadra signed a proposed plea form for a 28-year sentence (based on no contest pleas to four counts), which Chase would then present to the prosecutor. An interpreter read the plea form to Cuadra before he signed it.

Meanwhile, Chase had been preparing Cuadra's defense for trial, interviewing as many as 20 witnesses. He intended to advance a theory that Jane's mother had induced Jane to accuse Cuadra falsely. To support this theory, he noted that Cuadra was suing Jane's mother to recover ownership of property she allegedly "stole" from Cuadra by getting him to sign documents which, unbeknownst to Cuadra, effected the property's

transfer. However, because Chase's investigator was unable to interview Jane or her mother, Chase believed this theory amounted to "speculation." Furthermore, Jane's accusations were somewhat corroborated by Aunt Irma's testimony and the potential testimony of yet another witness, who, upon entering a room, observed Jane pulling her blouse down and Cuadra raising his hands suspiciously. Chase told Cuadra that he was in real danger of losing at trial, and his best prospect was to obtain a hung jury and hope for a better offer from the prosecutor in lieu of a retrial. Cuadra was fearful of losing the case and spending the rest of his life in prison.

On April 1, 2016, Chase received a supplemental report from the prosecutor recounting a meeting with the prosecution team and Jane's brother (Freddie) on March 31, 2016. The report contained information potentially helpful to Cuadra: Freddie had reported to police in 2002 (when Freddie was in the second grade) that Cuadra had molested him, but admitted to police on March 31, 2016 that Jane's mother had coerced him to make that false report because she believed Cuadra had cheated on her. Chase believed this supported his theory that Jane's mother had induced Jane to falsely accuse Cuadra.

Chase was unable to visit Cuadra before Monday, April 4, 2016, the date set for trial. In response to the 28-year plea form, the prosecutor insisted that Cuadra agree to a 32-year term. Chase then conferred with Cuadra in a holding cell. Although Chase does not speak Spanish and Cuadra has very limited English, they were able to converse in English a bit. When Chase informed Cuadra that the prosecutor was requiring a 32-year term to resolve the case, Cuadra became distraught. Chase explained to Cuadra the defense he could present on Cuadra's behalf, including the theory that Jane's mother had prompted Jane to make the allegations. Although Chase did not specifically recall talking with Cuadra about the new information regarding Freddie, he believed it was "very unlikely" he would not have mentioned it; the information increased the possibility of a hung jury. Chase advised Cuadra that there was a chance of losing and a chance of a hung jury, but he did not think there was any chance for an acquittal if he went to trial. Nevertheless, Chase assured Cuadra, "I'll try this case. I'll do my best for you. . . . If you

want to go to trial, we'll go to trial. I'll do that. I don't want to force you to sign this [plea agreement.]"

Chase testified that Cuadra did not express a need for more time to think about the plea offer. He later acknowledged, however, that Cuadra possibly did ask for more time, but Chase told him "[w]e've got to do this now or the offer is gonna go away." Chase did not request a continuance of the trial, because he did not believe the court would grant one. He noted that Cuadra seemed very intelligent and there was no apparent impediment to Cuadra understanding what was happening.

Before Cuadra entered his plea, Chase explained the change on the plea form from 28 to 32 years. Chase saw nothing about Cuadra's entry of plea that made him think it was not knowing and voluntary.

2. Cuadra's Testimony

Cuadra testified that he had only one year of schooling in rural Mexico and no experience with the courts in the United States except a bankruptcy proceeding and a charge of driving without a license. He spoke only Spanish. He discussed his case with Chase "about seven" times, usually with a translator. Chase told him that he was facing a life sentence and had a "99 percent" chance of losing. Frightened, Cuadra asked Chase to negotiate a deal for only five years' imprisonment. Later Chase tried unsuccessfully to negotiate a deal for 20 to 25 years.

On March 29, 2016, Cuadra signed a change of plea form for a 28-year prison sentence. At the time, he believed there was a 99 percent chance of losing at trial, which meant he would be in prison for the rest of his life. Other inmates told him that "nobody can win at a trial." Although he was innocent, he agreed to enter a plea "because of the pressure [he] was under."

On the day set for trial, Cuadra and Chase were between the holding cell and the elevators in the county jail when Chase said that Freddie had given a favorable statement to the prosecutor. Cuadra testified that he knew the statement was going to help his case, but he did not learn the actual content of Freddie's statement until after he entered his no contest plea. When he agreed to the 32-year plea offer, a Spanish interpreter was present.

But had he known of the content of Freddie's recent statement, Cuadra claimed, he would not have accepted the plea offer.

3. Vera-Vischer's Testimony

Alejandra Vera-Vischer, an investigator for the private defender program, assisted Chase in the preparation of Cuadra's case. On March 31, 2016, she interviewed a person who said that Jane's mother had offered him money four years earlier to kill Cuadra because he had been unfaithful to her. On March 30, 2016, another person told her that, according to Freddie and Jane, Jane's mother wanted Freddie to say that Cuadra "touched" him. On April 1, 2016, Chase advised Vera-Vischer that Freddie had recanted his 2002 allegation that Cuadra molested him. Vera-Vischer visited Cuadra after he had entered his plea and informed him of the information she had gathered. Cuadra appeared surprised and said, "Had I known about all this, I would not have taken the plea."

4. Proffer for Expert Witness Testimony

Cuadra's successor counsel sought to introduce the testimony of a purported expert witness, Dr. George Bach-y-Rita, regarding Cuadra's level of sophistication, intellectual functioning, and experience, which counsel claimed were pertinent to whether Cuadra's plea was "knowing, voluntary and intelligent." Counsel clarified that he did not contend Cuadra was incompetent under section 1368, but that Cuadra's "level of intellectual functioning" and state of mind were relevant to determine the voluntariness of his plea, because Cuadra was placed in a situation in which he was under great pressure, had only a partial description of new information important to the case, and lacked time to weigh the information in deciding whether to go to trial.

The court noted that a letter by Dr. Bach-y-Rita, attached to the motion to withdraw the plea and dated November 25, 2016, merely stated that Cuadra was functionally illiterate, "[his] mood was moderately depressed, his affect was flattened, his cognition was slow, but he was free of delusions or hallucinations." Dr. Bach-y-Rita opined in this letter that Cuadra was recuperating from a "major depressive disorder" with some psychomotor retardation and slowed cognition, but he did not make a

diagnosis of impaired intellectual ability because he was unable to perform the relevant tests due to Cuadra's illiteracy.

Defense counsel then made an offer of proof, representing that Dr. Bach-y-Rita would testify that Cuadra was depressed, which slows his mental functioning, which affects his ability to weigh different courses of action and increases the time it takes for him to absorb and process information and make a decision. Counsel reiterated that this information was relevant to whether Cuadra made a knowing and voluntary choice not to go to trial.

The court expressed concern that Dr. Bach-y-Rita "speaks about various mental health issues, but they don't go to capacity or go to any process . . ." After further argument, the court precluded the expert's testimony, concluding that the expert's evaluation of Cuadra, several months after Cuadra entered his plea, was not relevant.

C. Court's Ruling and Sentence

On September 29, 2017, the court denied Cuadra's motion to withdraw his plea. It acknowledged that Cuadra is "limited" in his reading and writing skills. But it found that Chase told Cuadra the content of Freddie's statement before Cuadra entered his plea (specifically finding Cuadra not credible on this issue). The court also found the circumstances confronting Cuadra on the day he entered his plea were "[p]retty common" – he faced two "bad choices" but made his selection "pretty clearly," and although information about Freddie was revealed "late in the game," it was "secondary" information and Cuadra's motion appeared to be based on "buyer's remorse." In addition, the court concluded that Chase had rendered effective assistance: he "conducted an extensive investigation, apparently had approximately twenty witnesses interviewed, understood the law, understood the facts, discussed all that with his client the best that he could, negotiated with the district attorney and then presented all that to his client who made a choice."

In October 2017, the court sentenced Cuadra to state prison for 32 years, consisting of consecutive eight-year upper terms on each of the four counts to which he pled no contest.

Cuadra filed a notice of appeal, and the trial court issued a certificate of probable cause as to the denial of his motion to withdraw his plea.

II. DISCUSSION

“At any time before judgment, . . . a trial court may permit a defendant to withdraw a guilty plea for ‘good cause shown.’ (§ 1018.) ‘Mistake, ignorance or any other factor overcoming the exercise of free judgment is good cause for withdrawal of a guilty plea’ under section 1018 [citation], and section 1018 states that its provisions ‘shall be liberally construed . . . to promote justice.’ A defendant seeking to withdraw a guilty plea on grounds of mistake or ignorance must present clear and convincing evidence in support of the claim. [Citation.] A trial court’s decision whether to permit a defendant to withdraw a guilty plea under section 1018 is reviewed for abuse of discretion. [Citation.]” (*People v. Patterson* (2017) 2 Cal.5th 885, 894.)

Cuadra contends the trial court erred in denying his motion to withdraw his plea because the court (1) precluded the expert witness testimony of Dr. Bach-y-Rita and (2) rejected Cuadra’s claim that trial counsel rendered ineffective assistance.

A. Exclusion of Expert Witness Testimony

Cuadra urges that Dr. Bach-y-Rita’s proposed testimony should have been admitted to show his plea was not entered knowingly and voluntarily, because it would have demonstrated that Cuadra’s slowed mental functioning required more time for Cuadra to process information and to decide whether to accept the plea offer or go to trial. He emphasizes that while the standard of competency for pleading guilty pertains to *capacity* – the defendant’s ability to consult with an attorney and understand the proceedings – it must also be found that the defendant’s waiver of his constitutional rights was, in fact, a *knowing and voluntary choice* between alternative courses of action in light of the circumstances. (See *Godinez v. Moran* (1993) 509 U.S. 389, 402; see also *Brady v. United States* (1970) 397 U.S. 742, 749.) Cuadra contends the court concluded that Cuadra’s competency to stand trial *also* established his ability to sufficiently comprehend the plea bargain, thus confusing the standard for competence under section 1368 with what is required for a knowing and voluntary plea.

We disagree. It is, of course, presumed that the court has followed the law. (*Wilson v. Sunshine Meat & Liquor Co.* (1983) 34 Cal.3d 554, 563.) Moreover, the hearing transcript indicates that the court was attentive to defense counsel's repeated distinction between competence under section 1368, which counsel was not challenging, and the knowing and voluntary nature of Cuadra's plea, which counsel was challenging. The court ultimately precluded the expert witness testimony because Dr. Bach-y-Rita's evaluation of Cuadra was "not relevant to this issue," particularly since it was rendered several months after Cuadra entered his plea. In our view, the court denied the motion not because it was confused or incorrect about the legal standard, but because it simply saw no sufficient tie between what Dr. Bach-y-Rita was going to say and the section 1018 issues in the case.

Cuadra fails to establish that the court abused its discretion in finding the proffered testimony irrelevant, particularly in light of Cuadra's own testimony. (See *People v. McDowell* (2012) 54 Cal.4th 395, 426; Evid. Code, § 801.) Cuadra did not testify that he needed more time to weigh the significance of Freddie's new statement to the prosecutor, or even that there was any information he had difficulty processing. To the contrary, Cuadra testified that he was *not told* about the content of Freddie's new statement. Defense investigator Vera-Vischer confirmed that, in speaking with Cuadra after his plea, Cuadra appeared surprised by Freddie's retraction and said, "Had I known about all this, I would have not taken the plea." If, as Cuadra insisted, Chase failed to provide the information, there was no probative value to expert testimony suggesting Cuadra would have had difficulty processing it.

Moreover, based on Dr. Bach-y-Rita's letter and counsel's offer of proof, Dr. Bach-y-Rita's testimony would have shed little if any light on Cuadra's ability to process any new information he *did* receive. As the trial court pointed out, Dr. Bach-y-Rita's evaluation of Cuadra took place approximately seven months *after* Cuadra entered his plea. As far as we know from counsel's offer of proof, Dr. Bach-y-Rita was not going to opine that Cuadra's depression and resulting slow mental processing existed when he entered his plea, that Cuadra was unable to understand his rights and alternatives or

lacked sufficient opportunity to process information at that time, or that his plea entry was not knowing and voluntary. Nor was there any proffer that Dr. Bach-y-Rita believed the specific information revealed on the day of Cuadra's plea – that Jane's mother had put Freddie up to false accusations a decade earlier – was so complex it would have required Cuadra additional time to process it.³

Finally, the court's preclusion of Dr. Bach-y-Rita's testimony was harmless. Even without the testimony, the court was aware that Cuadra lacked education, spoke little English, and was relatively unfamiliar with the judicial system. The court was also aware of Dr. Bach-y-Rita's letter indicating that Cuadra was depressed, which allegedly slowed Cuadra's mental processing. And the court was aware of defense counsel's argument that Cuadra's plea was not knowing and voluntary due to these factors and the press of time. Dr. Bach-y-Rita's testimony would have therefore added little. On the other hand, there was overwhelming evidence that Cuadra's plea was, in fact, knowing and voluntary. The court reviewed the transcript of the plea hearing and found "nothing in there that looks problematic," consistent with Chase's testimony. At the motion hearing, Cuadra did not claim to have lacked understanding of the consequences of his plea or been confused about the pros and cons of taking it; instead, his testimony reflected an awareness of the offers and counteroffers made in regard to his plea, a reasonable desire to avoid being tried and sentenced to prison for the rest of his life, and a discernment between 28 and 32 years of incarceration. The hearing transcript shows that Cuadra was responsive to the questions posed by the prosecutor and defense counsel. And the trial court, in prime position to observe Cuadra as he testified, found Cuadra not credible on several points. In short, there is no indication that, if the court had admitted Dr. Bach-y-Rita's testimony, the court would have granted Cuadra's motion to withdraw his plea.

³ To the contrary, according to Cuadra and the defense investigator, once Cuadra was told the content of Freddie's new statement a few days after entering his plea, he replied that he would not have taken the plea deal if he had known the information; there is no indication that his conclusion required lengthy deliberation.

B. Ineffective Assistance of Counsel

Cuadra contends his attorney rendered ineffective assistance by failing to ask for a continuance of the trial date, so Cuadra would have more time to consider whether to enter a plea. His argument is unpersuasive.

To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) the defendant has thereby been prejudiced, in that there is a reasonable probability the outcome of the proceeding would have been different (in this case, Cuadra would have insisted on going to trial) but for counsel's deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–692; *People v. Patterson*, *supra*, 2 Cal.5th at pp. 900–901; see *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1259–1260 [reviewing court may not retrospectively second-guess defense counsel's tactical decisions made in the trial court].)

Here, Chase had a valid tactical reason for not seeking a continuance of the trial: he believed not only that the continuance would be denied, but more importantly that the plea offer would be withdrawn, and with it the possibility of obtaining for Cuadra the outcome that Cuadra so consistently and clearly requested – a deal by which he would not have to spend the rest of his life in prison.

In his reply brief, Cuadra argues that “the trial court expressly stated appellant should have asked for more time and it was counsel's duty to make this request, which he did not.” Cuadra misstates the record. In the context of concluding that Chase provided *effective* assistance, the court stated “that Mr. Chase *might* have requested a continuance on that Monday morning based on new information,” and later observed, “if somebody had stood up in front of me and asked for a continuance at that point, I very likely would have given it to him *depending* on what the district attorney had to say, but that's not the issue here. The issue is whether the plea Mr. Cuadra, I think, chose to enter was appropriately done. And it does feel a bit like buyer's remorse.” (*Italics added.*) With that, the court denied the motion.

Cuadra also states in his reply brief that “the trial court here stated that had trial counsel explained these circumstances, including the need for an interpreter, and appellant’s cognitive limitations, it would have assured appellant received these reasonable accommodations needed for a knowing and intelligent plea.” We have reviewed the cited transcript pages, and the court said no such thing.

Cuadra fails to establish ineffective assistance of counsel.⁴

III. DISPOSITION

The judgment is affirmed.

⁴ Cuadra also states that his counsel did not “seek any reasonable accommodations for appellant’s language and literacy issues.” To the extent this remark refers to something other than counsel’s decision not to request a continuance, Cuadra provides no substantial argument to support his statement and we consider the issue waived. (See *Gunn v. Mariners Church, Inc.* (2008) 167 Cal.App.4th 206, 217–218.) We also note that Cuadra was provided an interpreter who translated the plea form aloud and, according to Cuadra, was present when he agreed to the 32-year sentence.

NEEDHAM, J.

We concur.

SIMONS, ACTING P.J.

BURNS, J.

(A152760)